IN THE

Supreme Court of the United States

October Term 1977

No. 77-376

COMMERCE TANKERS CORPORATION and
VANTAGE STEAMSHIP CORP.,

Petitioners,

vs.

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR NATIONAL MARITIME UNION OF AMERICA, AFL-CIO, IN OPPOSITION

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The Opinions Below, Statement of Jurisdiction, and the Questions Presented by petitioners are set forth in the petition. NMU's Statement of the Case is set forth in NMU's own petition for certiorari in this case, No. 77-358.

ARGUMENT

I.

The Court of Appeals Properly Limited Recovery for the Wrongful Injunction to the Amount of the Injunction Bond.

1. The decisions of this Court have uniformly limited recovery for wrongful injunction to the amount of the injunction bond. *Russell* v. *Farley*, 105 U.S. 433 (1881); *Meyers* v. *Block*, 120 U.S. 206 (1887); *Minneapolis, etc. Ry.* v. *Washburn Lignite Coal Co.*, 254 U.S. 370, 374 (1920); *Lawrence* v. *St. Louis-San Francisco Ry. Co.*, 278 U.S. 228 (1929). These decisions in turn, as the opinions disclose, rest on even more venerable doctrine, both in this country and England.[1]

2. This firmly established principle—known as the injunction bond rule—has been applied in innumerable cases by the Courts of Appeal and District Courts, including decisions rendered as recently as this year. *E.g.*, *Adolph Coors Co.* v. *A & S Wholesalers, Inc.*, 1977-2 CCH Trade Cases ¶ 61,565 (10th Cir. 1977); *Associated General Contractors* v. *Illinois Conference of Teamsters*, 486 F.2d 972, 975 (7th Cir. 1973); *First-Citizens Bank & Trust Co.* v. *Camp*, 432 F.2d 481 (4th Cir. 1970); *Atomic Oil Co. of Oklahoma* v. *Bardahl*, 419 F.2d 1097 (10th Cir. 1970), *cert. den'd*, 397 U.S. 1063 (1970); *Benz* v. *Compania Naviera Hidalgo, S.A.*, 205 F.2d 944 (9th Cir. 1953); *International*

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[1] Inasmuch as the District Court granted judgment against NMU for the full amount of the injunction bond, the fact that the entire judgment ran in favor of Commerce, the sole party enjoined by the preliminary injunction and therefore the sole obligee under the bond, is irrelevant. The allocation of this award is a matter between Commerce and Vantage.

Ladies Garment Workers Union v. *Donnelley Garment Co.*, 147 F.2d 246 (8th Cir. 1945), *cert. den'd*, 325 U.S. 852; *United Motors Service, Inc.* v. *Tropic-Aire, Inc.*, 57 F.2d 479, 483 (8th Cir. 1932); *In re Spencer Kellogg & Sons*, 52 F.2d 129, 134-135 (2d Cir. 1931). *Donnelley*, *Benz* and *Associated General Contractors* are labor cases.

3. The doctrine has also been recognized by all commentators. See 7 Moore's Federal Practice ¶ 65.10 at 65.98-99. Each of the articles or notes cited at p. 7 of the petition recognizes the universality of the rule.

4. The only judicial authority relied on by petitioners is the decision of the Third Circuit in *United States Steel Corp.* v. *United Mine Workers*, 456 F.2d 483 (3d Cir. 1972), *cert. den'd*, 408 U.S. 923, which is, however, plainly distinguishable from the decision below. In *United States Steel*, the Third Circuit acknowledged that the injunction-bond rule was well-established, but held it inapplicable to a claim based on Section 7 of the Norris-LaGuardia Act, 29 U.S.C. § 107, and made by a union that had been improperly subjected to a preliminary injunction against striking. The Court noted that, in contrast to Rule 65 FRCP, Section 7 expressly referred to counsel fees. The Court then concluded that a temporary injunction improperly issued in a labor dispute and directly contravening the express provisions of Section 4 of the Norris-LaGuardia Act, would under Section 7 of that Act, subject the plaintiff in the injunction action to liability for attorneys fees, even though these fees were greater than the amount of the injunction bond.[2]

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[2] The Third Circuit did review three of the four Supreme Court cases cited above, characterizing the statement of the injunction bond rule in each of those cases as dictum. The Third Circuit opinion did not mention *Meyers* v. *Block*, *supra*, in which this Court clearly stated (120 U.S. at 211):

> "By the law of Louisiana, damages may be recovered for suing out an injunction without just cause, independently of a bond.

The indispensable basis for the Third Circuit's decision was the applicability of Section 7 of the Norris-LaGuardia Act. Section 7 does not, however, operate in this case, and it is presumably for that reason that petitioners, in footnote 6 of the petition, disclaim reliance on the Norris-LaGuardia Act, thus disclaiming reliance on the Third Circuit's *ratio decidendi.* Under the decisions of this Court it is clear that Section 7 of the Norris-LaGuardia Act does not apply to actions to enforce agreements to arbitrate *Textile Workers* v. *Lincoln Mills,* 353 U.S. 448, 457-459 (1957). Furthermore, under the decisions of this Court, an action to enforce an arbitration award, e.g., an award that a strike violates a no-strike pledge, is not subject to the Norris-LaGuardia Act. See *Boys Market, Inc.* v. *Retail Clerks, Local 770,* 398 U.S. 235 (1970) at 244, n. 10; *Buffalo Forge Co.* v. *United Steelworkers of America,* 428 U.S. 397 (1976) at 405-407, 425, n. 18 (dissenting opinion). Judge Frankel's injunction herein enforced an arbitration award and was issued in an action seeking precisely that relief. Accordingly, *United States Steel* is inapplicable to the instant case and not in conflict with the decision below. Any conflict between the Third Circuit in that case and the Seventh Circuit in *Associated General Contractors* v. *Illinois Conference of Teamsters, supra,* would not support the instant petition.

5. The reasoning behind the injunction bond rule has been explicated in many of the decisions applying it. See,

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3 La. 291. But this can not be done *in the United States courts.* Without a bond, no damages can be recovered at all. Without a bond for the payment of damages or other obligations of like effect, a party against whom an injunction wrongfully issues can recover nothing but costs, unless he can make out a case of malicious prosecution. *It is only by reason of the bond and upon the bond, that he can recover anything.*" (Emphasis supplied).

for example, the opinion of Judge Learned Hand in *In re Spencer Kellogg & Sons, supra,* 52 F.2d at 134-135, and that of Judge Cardozo in *City of Yonkers* v. *Federal Sugar Refining Co.,* 221 N.Y. 206 (1917). The courts have made clear that among other objectives of the rule, it enables a litigant to know his monetary exposure in the event a preliminary injunction sought by him is subsequently reversed, so that, in Judge Cardozo's words, 221 N.Y. at 209, "he counts the cost, and assumes a liability whose maximum is a determinate amount"; and if the amount fixed seems not worth the risk, he may decline to translate the proffered injunction into an effective judicial command.

The considerations behind the injunction bond rule operate with special force in the labor arbitration context. This Court has held that good faith resort to contractual arbitration is to be fostered by the national labor policy. To deny a union or an employer, acting in good faith, the protection of the injunction bond rule would chill resort to arbitration and increase resort to self-help, and would, accordingly frustrate the national policy.

The requirement of an injunction bond and the imposition of liability to the extent of the bond is itself an exception to the basic concept underlying our system of justice, that good faith recourse to the courts does not carry a price-tag and that good faith litigants are not held responsible for the consequences of judicial error. Given the national policy in favor of labor arbitration, it would be startling and perverse in this case to extend that exception beyond its historic limits.

For over a century, litigants, like the NMU herein, have relied on the injunction bond rule. If reexamination of this long-standing, well-settled rule be deemed appropriate—and petitioners, we submit, have made no showing that it is—the proper method is by prospective amendment of

Rule 65 FRCP or by Congressional legislation and not by a retroactive abolition of a rule on which parties have long justifiably relied.[3] It is ironic, indeed, that a petition that invokes due process should call for a retroactive change that would operate harshly and unfairly on a labor union, a member of the class that Norris LaGuardia was designed to protect against procedural unfairness and judicial policy making.

II.

The Application of the Injunction Bond Rule Did Not Deprive Petitioners of Due Process.

Petitioners also urge that "under the peculiar circumstances of this case" the application of the injunction bond rule deprived them of procedural due process. Such a narrow factual claim, already rejected by two courts, does not present an issue of general importance warranting review by this Court.

In any event, petitioners' contentions are wholly without merit. The petition distorts the factual record and misconceives the governing legal standards. The record makes it clear that the proceedings resulting in Judge Frankel's

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[3] Petitioners criticize decisions dispensing with the bond requirement altogether, particularly in "public interest" cases, and question whether federal courts should inject themselves into controversies at a "preliminary" stage. This private lawsuit in which a bond *was* required and judgment *was* rendered for its full amount is hardly an appropriate vehicle for exploring the issues suggested by petitioner. Nor do we believe petitioners seriously suggest that this Court consider the total elimination of the preliminary injunction from the arsenal of available judicial remedies.

preliminary injunction did not abridge constitutional rights.[4]

The arbitration before the contractually designated arbitrator, Mr. Theodore Kheel (insultingly referred to in petitioners' footnote 11 as "its [NMU's] arbitrator"), was commenced on January 25, 1971, by written demand served upon Commerce, which had been preceded by written and oral reminders of the "sale and transfer" clause of the collective agreement.[5] Two full weeks elapsed between the arbitration demand and the arbitration hearing on February 8, 1971. At that hearing Commerce, represented by two attorneys, admitted that it had contracted to sell the S/S Barbara in violation of its agreement with NMU but sought a further adjournment to brief issues as to the validity of the agreement. No contention was made then or afterward that Commerce was unaware of the matter to be arbitrated. Since under prevailing law the claimed invalidity of the agreement was beyond the arbitrator's jurisdiction, Mr. Kheel, faced with an admission regarding the only question properly before him, issued an award in favor of NMU.

That award did not have the force of a judicial command and would not have prevented a sale of the vessel. Accordingly, the NMU promptly sought judicial confirmation in the federal district court.[6] Although Rule 65(b) expressly

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[4] A chronology of events was stipulated at trial and appears in the Appendix below commencing at 1312a. The pertinent pleadings, motions, affidavits, exhibits and orders resulting in Judge Frankel's injunction are contained in that Appendix at 1a-134a.

[5] No notice was sent to Vantage because Vantage was not a party to the NMU contract or to any arbitration agreement with NMU.

[6] Vantage was not made a party to the NMU confirmation proceeding because no arbitral award was issued against it and no judicial relief was sought against it. However, Vantage promptly moved to intervene, and its motion was granted several days prior

contemplates the issuance of *ex parte* temporary restraining orders, NMU gave telephonic notice to Commerce's counsel of its intent to seek such an order.[7] Commerce was in fact represented by counsel at the hearing before Judge Wyatt on NMU's application for a temporary restraining order, as Judge Wyatt's order specifically recites. The counsel so notified was the same attorney who had represented Commerce in the making of the contract with Vantage and who had been co-counsel for Commerce at the arbitration hearing the preceding day.

The order to show cause initiating the proceeding to confirm the award was signed, served and filed on February 9, 1971. The hearing before Judge Frankel took place on February 23rd.[8] During the intervening two weeks, both Commerce and Vantage submitted affidavits opposing the NMU's motion[9] and memoranda of law dealing

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to the hearing before Judge Frankel. Vantage participated fully in that hearing, through affidavit, memorandum of law, and oral argument. Judge Frankel's injunction restrained Commerce only, not Vantage, and that was undoubtedly the reason why the injunction bond ran in favor of Commerce alone. Vantage did not object to this aspect of the bond.

[7] Telephone notice of applications for temporary restraining orders conformed to the procedure in the Southern District of New York.

[8] In another unworthy distortion of the facts, petitioners assert (Pet. p. 13) that when Judge Wyatt vacated his own TRO, "NMU applied before a different federal judge" for a preliminary injunction. In 1971 in the Southern District of New York, cases were not assigned to a single judge for all purposes. Judge Wyatt was the assigned *ex parte* judge and Judge Frankel was sitting in motion part. NMU did not apply to any particular judge and had nothing to do with the assignment or selection of the judge who heard either its own applications or those of its adversaries.

[9] Nowhere in the submissions to Judge Frankel did the companies claim that Commerce was not bound by the NMU agreement. Indeed, Commerce's affidavit expressly stated that "Commerce is a party to a collective bargaining agreement with the NMU dated

extensively with their antitrust and labor law challenges to the validity of the contractual "sale and transfer" clause.[10]

On February 23rd, Judge Frankel heard full argument from Commerce's and Vantage's respective counsel.[11] His oral restoration of the temporary restraining order was followed by a formal preliminary injunction and a written opinion of nineteen pages.[12]

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as of June 15, 1969." Years later, at the trial of the present action before Judge Griesa, Commerce stipulated that it was bound by that agreement, and Judge Griesa so found. It is unnecessary, therefore, to respond to petitioners' misstatements as to the making and adoption of that agreement, other than to note that all contracting employers, including Commerce, received a copy; none of the employers protested that the document did not represent the agreement reached; and all employers, including Commerce, accepted it as the instrument which prescribed the terms and conditions of employment of their unlicensed seamen.

[10] The affidavits and attached exhibits of the two companies comprise 43 pages of the Appendix in the Court of Appeals. The companies' memoranda of law to Judge Frankel aggregate 76 pages.

[11] Footnote 13 of the petition suggests that the companies did not consent to treating the motion to confirm as a motion for a preliminary injunction. Judge Frankel's initial order was signed on February 24th. On February 25th, Commerce submitted a "counterproposed order" which Judge Frankel signed, superseding the earlier order. On March 18th, Commerce moved to resettle the order and annexed its proposed resettled order, which Judge Frankel declined to sign. Both Commerce's counter-proposed order of February 25th and its proposed resettled order of March 18th recited that "It having been stipulated by the parties that the Court might treat the motion as one for a preliminary injunction. . ."

[12] We emphatically disagree with petitioners' assertion in their footnote 9 that Judge Frankel's characterization of the conduct and motives of the companies was later proven to be unfounded, although, in any event, an erroneous judicial appraisal of the underlying facts would not rise to the level of a deprivation of due process.

The only cases cited by petitioners, *Fuentes* v. *Shevin*, 407 U.S. 67 (1972), and *Goldberg* v. *Kelly*, 397 U.S. 524 (1970), only confirm the emptiness of their position. In both cases, no hearing at all was provided, and this Court took pains to emphasize that although minimum due process staples were essential, no particular form of hearing or type of tribunal was constitutionally required. In the instant case, a federal court granted the time-honored remedy of preliminary injunction after notice, submission of affidavits and memoranda, hearing before the Court, and participation of counsel at all stages. Petitioners received more notice than the Federal rules require and a lengthier than usual period to prepare. To assert that this procedure somehow deprived them of due process borders on the frivolous. See *Gryger* v. *Burke*, 334 U.S. 728, 731 (1948); *Brault* v. *Town of Milton*, 527 F.2d 730, 738-739 (2d Cir. 1975).

III.

The Instructions of the Court of Appeals on Remand to the District Court Do Not Conflict With the Decisions of This Court.

1. The brief, interlocutory instructions of the Court of Appeals on remand to the District Court were plainly not intended as a comprehensive statement of the applicable legal standards either under the labor exemption or the rule of reason. For this Court to undertake review of these cursory, general comments at this time would be clearly inappropriate.

2. In any event, the statements of the Court of Appeals are wholly consistent with this Court's decision in *Connell Construction Co.* v. *Plumbers & Steamfitters Local Union*

No. 100, 421 U.S. 616 (1975). Petitioners, at p. 15, refer to a balancing of the interests "favoring collective bargaining" with those "favoring free competition." But the "interests favoring collective bargaining" must themselves be given specific content. Consequently, consideration must be given to the nature and the legitimacy of the purpose of the challenged provision of the collective bargaining agreement. *Connell* itself speaks of such an inquiry. 421 U.S. at 622, 625-626. See also *Meat Cutters, Local 189* v. *Jewel Tea Co.*, 381 U.S. 676 (1965), particularly footnote 5 at 960. A determination that a particular goal represents a legitimate collective bargaining objective does not necessarily end the judicial inquiry, but it is certainly an essential part of that inquiry.[13] That is all the Court below said, and in doing so it plainly conformed to the decisions of this Court.[14]

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[13] We do not think it necessary here to reply fully to footnote 16 of the petition. The reference in the opinion below to the inclusion of the sale and transfer clause in the Commerce-NMU collective bargaining agreement derives directly from *Connell*. There this Court emphasized that the restraint involved was not embodied in a collective bargaining agreement and that the Plumbers Union did not represent, or seek to represent, Connell's employees. This case is poles apart from *Connell*. NMU did represent the seamen aboard the Barbara and had a legitimate interest in continuing to represent them and to protect their rights and benefits under the collective agreement, whether the vessel was owned by Commerce, Vantage, or any other American flag oprator. The purpose of the sale and transfer clause was to protect those interests. On the other hand, nothing in that clause applied to Vantage's other vessels or impinged in any way on Vantage's commercial use of the vessels it already owned.

[14] Out of an abundance of caution, we reiterate footnote 6, p. 9, of our own petition for certiorari, No. 77-358. We there stated that if the shipping companies sought review of antitrust questions in this case (as they now have) and if this Court were disposed to grant such review, our own petition should be deemed to include a request that the Court also review the question of whether the evidence required a dismissal of the Sherman Act claims on the basis of the labor exemption. That antitrust issue,

CONCLUSION

The shipping companies' petition for a writ of certiorari should be denied.

Respectfully submitted,

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unlike the one raised by the companies, presents a question of substantial general importance, is based exclusively on the existing trial record, and if decided in NMU's favor would end the case and obviate the need for any remand to the District Court.